Petition

NO. 81-319

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ALEXANDER L. STEVAS,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

DAVID GEORGE KIMMEL,

Petitioner,

vs.

STATE OF INDIANA,

Respondent,

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF INDIANA

PETITION FOR A WRIT OF CERTIORARI

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THE QUESTIONS PRESENTED FOR REVIEW

1. Was petitioner entitled to a hearing on the effect of newspapers, which contained both true and false articles about his trial, in the jury room?

2. Were petitioner's Due Process rights offended by the court's denial of his motion for a serological test which could have scientifically demonstrated his innocence?

3. Was the proof of petitioner's guilt inadequate to the extent that Due Process of Law was denied to him?

THE PARTIES TO THE PROCEEDING

These are all shown in the caption of the case.

TABLE OF CONTENTS

Page

The Questions Presented for Review 1
The Parties to the Proceeding 1
Table of Contents 2
Table of Authorities 3
Reference to the Opinion Below 5
Statement of the Grounds on which the Jurisdiction of this Court is invoked 5
Constitutional Provisions Involved 5
Statement of the Case 6
Reasons Relied on for Allowance of the Writ 8

I. Petitioner was entitled to a hearing on the effect of newspapers, which contained both true and false articles about his trial, in the jury room 8

II. Petitioner's Due Process rights were offended by the trial court's denial of his motion for a serological test which could have scientifically demonstrated his innocence 11

III. Proof of petitioner's guilt was so inadequate as to deprive him of Due Process of Law 13

Conclusion 19
Appendix A – Opinion and Judgment of the Indiana Supreme Court 20
Appendix B – Order of the Indiana Supreme Court Denying a Rehearing 32

TABLE OF AUTHORITIES

Page

Cases:

Carter v. Illinois, 329 U.S. 173, 67 S.Ct. 216, 91 L.Ed. 172 (1946 11
Cole v. Arkansas, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948) 11
Hansen V. Indiana, 230 Ind. 635, 106 N.E.2d 226 (1952) 12
Hicks v. Oklahoma, _____U.S._____, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980) 12
In re Winship, 197 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 13
Irvin V. Dowd, 368 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1960) 9, 10
Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); reh.den. 444 U.S. 890, 100 S.Ct. 195, 62 L.Ed.2d 126 (1979) 13
Kimmel v. Indiana, 418 N.E.2d 1152, (Ind. 1980) 5
Marshall v. United States, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959) 9, 10
Mattox v. United States, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1892) 9
Murphy v. Indiana, 352 N.E.2d 479 (Ind. 1976) 12
Parker v. Gladden, 385 U.S. 363, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966) 10
Remmer v. United States, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954) 10
Reynolds v. Cochran, 365 U.S. 525, 81 S.Ct. 723, 5 L.Ed.2d 754 (1961) 10
Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966) 9
Turner v. Louisiana, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965) 9

Page

Cases:

Watts v. Indiana, 338 U.S. 49, 69 S.Ct. 1347, 93 L.Ed. 1801 (1949) 16

Miscellaneous:

American Bar Association Standards Relating to Post-Conviction Remedies, 2.1 12
Constitution of the United States, 6th Amendment ... 5
Constitution of the United States, 14th Amendment ... 6
Indiana Rules of Appellate Procedure, Rule 11 (B) 5
Indiana Rules of Criminal Procedure, Rule 21 12
Indiana Rules of Trial Procedure, Rule 35 12
28 U.S.C. 1257 (3) 5

REFERENCE TO THE OPINION BELOW

The opinion of the Indiana Supreme Court, reported at 418 N.E. 2d 1152, appears as Appendix A hereto.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Indiana Supreme Court was entered on April 7, 1981. (In that court no separate judgment is entered–it is contained in the opinion.)

A timely petition for rehearing was denied on June 17, 1981. (Appendix B)

The Supreme Court of Indiana is the highest court in that state having jurisdiction to review decisions of lower state courts. (Indiana Rules of Appellate Procedure, Rule AP 11 [B].)

This petition for a writ of certiorari will be filed within sixty (60) days of the Indiana Supreme Court's denial of the petition for rehearing of the decision herein. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States:

6th Amendment:

> "Rights of the accused. –In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and

to have the assistance of counsel for his defense."

14th Amendment:

"* * * No state shall make or enforce any law which shall abridge the privileges or immunities of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The action was instituted by the filing of an information against the petitioner in the trial court on the 6th day of January, 1978. Count I charged burglary; Count II, sodomy and Count III, commission of a felony, sodomy, while armed. Petitioner pleaded not guilty. Trial to a jury commenced on January 22, 1979 and on January 26, 1979 the jury returned verdicts of guilty on all three counts.

On February 5, 1979 petitioner filed a Petition for a Serological Examination of Semen. This petition was filed at the suggestion of the trial court after petitioner's counsel learned of the possibility of examinations for blood grouping at the end of the trial of this cause. The court granted the motion on February 6, 1979. On March 14, 1979, a John Pless, and M.D. and a Pathologist at the Bloomington Indiana Hospital informed counsel that the serologist previously suggested could not perform the laboratory examinations as ordered and that the alternate serologist needed the blood type and secretor status of the victim in order to proceed under the court's order. On April 18, 1979, petitioner filed a Motion for Serology Exam, seeking an order to obtain the additional medical information. This was denied.

In the meantime, during the trial of this cause, the *Indiana Daily Student*, a local newspaper, had printed various articles reporting the case in progress. On Wednesday, January 24, 1979, an inaccurate representation of the facts of the case was printed. Specifically the article entitled "Rape Victim Testimony Heard As Trial of I.U. Grad Begins " incorrectly stated that Deanna Carrie, the victim, had testified she had previously identified the petitioner in a lineup. The inaccuracy of this statement was admitted by the newspaper on the following day when a correction was printed. This "correction" stated that "Police Sgt. Barbara Webb said that the victim had picked the Defendant out of the lineup." (What the victim actually said, in viewing the petitioner in a lineup, was: '#5 was, I'm not real sure though. I can't say for sure. #5, there is something about him. Maybe its just my imagination, I don't know.")

After the trial it was brought to the attention of James Lowenthal, one of petitioner's counsel, that the *Indiana Daily Student* and possibly other newspapers were in the jury room on a daily basis during the trial. Immediately after Counsel was informed of this a "Verified Motion to Permit Defendant to Produce Evidence of Jury Improprieties" was filed with this court on February 8, 1979, which was supplemented by a memorandum filed on February 9, 1979. This motion recited the information supplied to petitioner's counsel and requested a hearing on the question of whether any jurors had read the articles pertaining to the case, and if so whether petitioner's rights were prejudiced. The court denied the motion on February 13, 1979.

Thereafter, the court entered judgment: On Count I the petitioner was sentenced to a term of imprisonment of not less than ten, nor more than twenty, years. On Count III he was sentenced to a term of imprisonment of fifteen years. The court set aside the jury's verdict on Count II as being included in Count III.

Petitioner filed a motion to correct errors (the Indiana prerequisite to an appeal) on April 23, 1979. In this motion he raised two federal questions here asserted. The assertion raised

in Issue II reads as follows:

> "WHETHER THE COURT COMMITTED REVERSIBLE ERROR BY DENYING DEFENDANT HIS CONSTITUTIONAL RIGHTS OF DUE PROCESS' AND RIGHT TO TRIAL BY A FAIR AND IMPARTIAL JURY BY DENYING DEFENDANT'S MOTION TO PERMIT THE PRODUCTION OF EVIDENCE OF JURY IMPROPRIETY AND A HEARING THEREON."

In support of this assertion petitioner submitted affidavits averring that newspapers were seen in the jury room during petitioner's trial.

Issue IV of the motion to correct errors questioned:

> "WHETHER THE COURT IN DENYING DEFENDANT'S MOTION FOR SEROLOGICAL EXAMINATION ABUSED ITS DESCRETION AND DENIED DEFENDANT HIS RIGHT TO DUE PROCESS OF LAW."

The motion to correct errors was denied on May 14, 1979. Thereafter, petitioner prosecuted his appeal to the Indiana Supreme Court. In his appellate brief (p. 102) petitioner raised his third federal question: Violation of his 14th Amendment Due Process rights by failure to prove his guilt beyond a reasonable doubt.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

A state court of last resort has decided federal questions in a way in conflict with decisions of this court.

I. Petitioner was entitled to a hearing on the effect of newspapers, which contained both true and false articles about his trial, in the jury room.

The record demonstrates that newspapers, with daily accounts of petitioner's trial–one totally inaccurate–were in the jury room on a daily basis. The trial judge had made an order prohibiting jurors from reading any account of the trial. Petitioner, when apprised of these facts, filed a "verified motion to permit defendant to produce evidence of jury impropriety", which was denied. The trial court, without the benefit of a hearing on the impropriety issue, denied it with written reasons. The court was not impressed by the motion because petitioner did not arrive with full blown proof of any jury impropriety. On such a sensitive issue the court should have, at minimum, granted petitioner a hearing.

The Sixth Amendment confers the right to an impartial jury with other attendant rights, and this Court has written a number of opinions making the Amendment more explicit. One of the earliest is *Mattox v. United States*, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1892), in which a conviction was reversed where the bailiff improperly communicated with the jury, the communication including the reading of a prejudicial newspaper report.

Irvin v. Dowd, 366 U.S. 717, 723, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1960), dealt with excessive publicity in a criminal case (which all jurors said they could disregard). This Court held a Juror's "verdict must be based upon the evidence developed at the trial". To this same effect is *Sheppard v. Maxwell*, 384 U.S. 333, 352, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). In *Marshall v. United States*, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed. 2d 1250 (1959) jurors were exposed to a newspaper article which printed matter the trial judge excluded from evidence. Questioned in chambers the jurors all said they could disregard the article, nonetheless this Court, exercising its supervisory powers, reversed.

Turner v. Louisiana, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965) dealt with the issue of Sixth Amendment rights being violated by witnesses in the company of jurors:

> "In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the

> the 'evidence developed' against a defendant shall come from the witness stand in a public court-room where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel. * * *" 379 U.S. at 473

In the case at bar the identity of petitioner was a critical issue. A newspaper account falsely stated that the victim testified she had previously identified petitioner. There is evidence in the record that this newspaper was in the jury room on a daily basis. Although the record of whether the newspapers were read and the effect of such reading is inconclusive that is so because a hearing was not had on the matter. Under similar circumstances disavowals by jurors of exposure or prejudice have never impressed this Court. *Irvin v. Dowd, supra; Marshall v. United States, supra.* The trial court was impressed by Indiana law which decrees that jurors may not testify to impeach their verdict. However, this court, in the Constitutional frame of reference, acknowledged such testimony. See *Parker v. Gladden,* 385 U.S. 363, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966).

Petitioner feels that he has, *prima facie,* demonstrated impropriety. Why no hearing on such a critical issue? A number of decisions of this Court mandate a hearing in instances such as the one at bar.

In *Remmer v. United States,* 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954) the defendant discovered, after conviction, that an unidentified person had contacted a juror concerning the case. The juror had informed the judge, who notified the prosecutor. The F.B.I. conducted an investigation and concluded it had been a joke. Defendant filed a motion for a new trial with supporting affidavits. The trial court denied the motion without hearing. This Court reversed with instructions to conduct a hearing to determine the impact of the contact on the juror and whether any prejudice resulted.

Although in a different context, *Reynolds v. Cochran,*

365 U.S. 525, 81 S.Ct. 723, 5 L.Ed.2d 754 (1961) holds that an arbitrary refusal to hear a party by counsel constitutes a denial of hearing and thus of due process.

In *Carter v. Illinois*, 329 U.S. 173, 67 S.Ct. 216, 91 L.Ed. 172 (1946), this Court said that it is not conclusive for due process considerations that the proceedings are unassailable on the face of the record. The State must give one convicted of crime the opportunity to open an inquiry into the fairness of a criminal proceeding, though it appears proper on the surface. Questions of fundamental justice protected by the due process clause may be raised *dehors* the record.

Finally, *Cole v. Arkansas*, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948) held that notice of a charge and the right to be heard on issues raised is the constitutional right of every accused in all courts.

II. Petitioner's Due Process rights were offended by the court's denial of his motion for a serological test which could have scientifically demonstrated his innocence.

The record demonstrates that petitioner had been led to believe that no valid test was available from which blood type or group could be determined from semen samples taken from the victim in this cause. At trial, Dr. Anderson, the gynocologist who had examined the victim, reiterated his opinion that such tests were unavailable. It was from the last witness on Thursday, January 25, 1979, (the day before the verdict) that petitioner learned the truth, Kenneth Houck, a laboratory technician called by petitioner to testify as to other matters, testified that such tests could in fact be conducted if semen samples had been taken and retained. Petitioner in his February 5, 1979 petition, which was granted, stated that he had learned of the retention by the Bloomington Hospital, of some of the semen sample taken from the victim on June 13, 1977. These and other facts led to the two requests for serology examinations. The first was granted on February 6, 1979. On March 14, 1979, a John Pless, an M.D. and a pathologist at the Bloomington, Indiana Hospital informed counsel that the serologist previously suggested could not perform the laboratory examinations as ordered and that the alternate serologist needed

the blood type and secretor status of the victim in order to proceed under the Court's order. On April 18, 1979, petitioner filed a Motion for Serology Exam, seeking an order to obtain the additional medical information. This was denied. It appears from the record that petitioner's innocence could have been scientifically demonstrated if the court would have granted his second motion. It is true that the victim would have suffered the inconvenience of blood and secretor drawing, but that seems a relatively minor inconvenience if the absolute truth is to be sought.

Federal authority for this specification of petitioner's petition is scarce to non-existent. Petitioner presented the question to the lower court as "newly discovered evidence." He contends that his discovery of it meets all the criteria set out in *Hansen v. Indiana*, 230 Ind. 635, 106 N.E.2d 226 (1952). He had a right, pre-trial, to such examination. See Rule 21, Indiana Rules of Criminal Procedure; Rule 35, Indiana Rules of Trial Procedure and *Murphy v. Indiana*, 352 N.E.2d 479 (Ind. 1976) initially, the trial court agreed. Petitioner is thus driven to the conclusion that Indiana's clear failure to follow its own procedure conflicts with *Hicks v. Oklahoma*, _____U.S._____, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980).

Although not specifically in point, the American Bar Association Standards Relating to Post-Conviction Remedies, 2.1. by analogy, provide:

> "A post-Conviction remedy ought to be sufficiently broad to provide relief
> (a) for meritorious claims challenging judgments of conviction, including claims:
> * * *
> (v) that there exists evidence of material facts, not theretofore presented and heard, which require vacation of the conviction or sentence in the interest of justice:"

III. Proof of petitioner's guilt was so inadequate as to deprive him of Due Process of Law:

For a number of years the question of the constitutional effect of proof of guilt less than beyond a reasonable doubt was unanswered. Then this Court decided *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) which should have largely answered the question. However, it was not until *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), reh.den., 444 U.S. 890, 100 S.Ct. 195, 62 L.Ed.2d 126 (1979) that full awareness descended on the Bar (at least this writer) of the uses that could be made of this Court's answer to the question.

Petitioner thus reviews the evidence to see if it passes constitutional muster:

A. Certain Circumstantial evidence was inconsistent with petitioner's guilt.

(1) Deanne Carrie (the victim) gave the following description of her assailant to officer McMurry shortly after the events in question: (a) 5'10" in height; (b) 'medium build'; (c) 'slender waistline'; (d) hair between the eyebrows; (e) 25-30 years of age; (f) hair that covered his ears.

Photographs of petitioner admitted into evidence, which were taken in the Spring and Summer of 1977, show he had the following characteristics which are inconsistent with those of the perpetrator at the time of the events in question: (a) heavy build; (b) no hair between his eyebrows; (c) 22 years old; (d) hair cut very short.

These characteristics were corroborated by a co-worker with petitioner during the summer of 1977, and Cindi Kugel, petitioner's girlfriend. In trial Deanne Carrie stated that the perpetrator of the crime had collar-length hair longer than petitioner's, whose hair was cut at trial as it had been in June, 1977.

(2) Deanne Carrie stated that her assailant made statements to the following effect: (a) 'My name is John'; (b) 'I just got off a train'; (c) 'My girlfriend died'.

Petitioner's name was not 'John'. There was no evidence that he ever used that name. L & N trainmaster McCall testi-

fied that it would not have been possible for David Kimmel to have arrived in Bloomington by train from Martinsville on the evening of June 12 or morning of June 13, 1977. David Kimmel's girlfriend was alive and well.

These statements by the assailant are inconsistent with petitioner's guilt.

(3) On July 10, 1977, less than a month after the attack on Deanne Carrie, a man attempted entry of the apartment of Jane Disbrough at 2:00 in the morning. Ms. Disbrough lived in the same apartment complex in which Deanne Carrie had been assaulted. Entry was attempted through a downstairs window. Ms. Disbrough saw the man face to face two times and described him as a white male, 5'7" to 5'8" tall, medium build, college age, with brown collar length hair. This description is consistent, to a high degree, with that given by Deanne Carrie of her assailant. Jane Disbrough testified that she was certain that the man who attempted entry into her apartment was not David Kimmel.

This incident of July 10 is much more like the June 13 incident than was the December 23 incident, (See opinion of the Indiana Supreme Court, Appendix A) which was admitted as evidence that David Kimmel perpetrated the June 13 crimes. The similarity of physical description, the shorter time interval involved, occurrence at the identical location and evidence of actual attempted entry though a window far more closely match the events of June 13 than do the events of December 23. This evidence shows it is far more likely that the man involved on July 10 was the assailant on June 13, than was David Kimmel. Petitioner maintains that the fact that David Kimmel did not perpetrate the July 10 incident is circumstantial evidence that he did not perpetrate the June 13 incident.

B. No circumstantial evidence is inconsistent with the reasonable theory of his innocence presented by petitioner.

Petitioner testified that he was home alone asleep in bed at the time of the events in question. His neighbors testified that he was at their apartment, next to his, visiting, the evening before the crimes occurred, that they had not heard him leave the apartment complex, and that if he had left at least one of

them would in all likelihood have heard him go because of the excessively loud noise made by his muffler. He worked a full shift at a physically demanding job at 84 Lumber in Indianapolis both the day before and the day of the crimes in question. While this testimony need not be believed as a matter of law, it presents a reasonable theory of the petitioner's innocence.

(1) Petitioner testified that he was present in the apartment eventually occupied by Deanne Carrie a few weeks previous to June 13 at a party held by a previous tenant, and that he entered by and remained near the door on which his fingerprints was later found. The occurrence of a party and possibility that David Kimmel attended it was confirmed by the apartment's former tenant, Ron Platter.

In the substantive law of Indiana, fingerprints have been held sufficient to prove guilt only when they in some manner directly link the accused to the commission of the crime, not just to its place of commission. A fingerprint shows *that* an object was touched, not *when* it was. Unless the time of the touching is shown to be simultaneous with the time of the crime, then the fingerprints are merely circumstantial evidence of the identity of the perpetrator. Since, in the case at bar, the presence of petitioner's fingerprint could be explained by earlier authorized access to the premises and was in no way directly connected to the crime (the perpetrator entered through a window, then exited through a door other than that on which petitioner's fingerprint was found) its presence is not inconsistent with a reasonable theory of petitioner's innocence, and is not sufficient to establish his guilt.

(2) Barbara Webb, principal investigating officer of the Bloomington Police Department in charge of this case testified over objection that in a line up Deanne Carrie 'identified' David Kimmel. She did not testify that Ms. Carrie identified him as her assailant in the charged offense. Her further testimony revealed that the 'identification' was not positive or even tentative, but only related to the possibility of identity. The words spoken by Ms. Carrie, the evidence showed, were: #5 was, I'm not real sure though. I can't say for sure. #5, there is something about him. Maybe its just my imagi-

nation, I don't know.' Certainly the law cannot allow hearsay statements to have any greater probative value than the actual words spoken by the hearsay informant. The words spoken by Deanne Carrie are not inconsistent with David Kimmel's explanation of his innocence.

(3) The events of December 23 are not inconsistent with Mr. Kimmel's testimony that he did not commit the crimes charged.

(4) The fact that David Kimmel smoked Vantage cigarettes at the time of his arrest for the December 23 incident 6 months after the events in question, is not inconsistent with his innocence, despite the fact that there was evidence that the assailant may have smoked Vantage cigarettes during the events of June 13. However, the cigarette butts deserve our attention. We first pray this Honorable Court to take judicial notice of certain facts–facts which it has a right to judicially notice. This Court in *Watts v. Indiana*, 338 U.S. 49, 52, 69 S.Ct. 1347, 1349, 93 L.Ed. 1801, 1805 (1949) has said:

> "And there comes a point where this Court should not be ignorant as judges of what we know as men."

What we know as men is that the fear of cancer has driven millions of Americans to smoking so-called "light" cigarettes, that "Vantage" is a light cigarette and that certainly thousands, if not millions, of Americans smoke Vantage cigarettes.

Deanne Carrie spent close to a half hour in her bedroom with her assailant. She talked with him and had extensive opportunities to observe his appearance. Yet she did not testify that David Kimmel was the man. This absence of direct evidence is most unusual. Under such circumstances the safeguards concerning conviction by circumstantial evidence alone become especially understandable and important. The fact that the victim who had opportunity to observe her assailant could not identify petitioner would in fact seem to be a circumstance inconsistent with his guilt.

There are, thus, *arguendo* these elements which could

militate for petitioner's guilt. They, and our characterization of them, follow:

In court identification:	None
Out of court identification:	Uncertain
Fingerprint:	A possibility
Cigarette butts:	A possibility
Other incident:	A suspicious circumstance

We then rhetorically ask this High and Honorable Court: Do a negative, an uncertainty, two possibilities and a suspicious circumstance gain strength to convict by accumulation? Is the sum greater than its added parts? Do a number of weak points become strong when added together? These questions, of course, supply their own answers.

Yet another factor remains. Indiana law does not admit evidence of a polygraph test. Thus, outside of the jury's presence petitioner made an offer to prove the results of a polygraph examination administered to petitioner by a highly qualified expert, Fred Houck:

> "Q. Have you drawn a conclusion as to whether or not (David Kimmel) was in Bloomington, Indiana, on the morning, night of June 12th or morning of June 13, 1977?
>
> A. Yes, I have.
>
> Q. And what is your conclusion?
>
> A. That he was not in Bloomington.
>
> Q. Now, how positive would you say you are of that?
>
> A. I have no reservation on that at all.

Q. You are telling us that he is so classic a responder and that his responses after looking at the entire test were such that you, you are staking your entire reputation on that?

A. Based on the totality of that examination, I unhesitantingly say, and based on my training and experience, that he did not perpetrate the crime of which he is accused."

Dr. Dwight Schuster, a psychiatrist, conducted two examinations of David Kimmel–August 17 and 29, 1978. He also had him take a battery of psychological tests.

The first interview was the standard psychiatric examination, the second was conducted while petitioner was under the influence of sodium amytal, a barbituate given intervenously during the interview. Its purpose is to relax the patient, thus assisting the psychiatrist in recovering additional information in order to evaluate a person's story. Although it is possible to be deceptive while under the influence of the drug, Dr. Schuster felt that petitioner told the truth. It was Dr. Schulter's opinion that petitioner was a passive individual with no overt aggressiveness, that he was not a sexual deviate, nor did he have the propensity to carry out anti-social acts. Dr. Schuster did discuss sexual fantasies with the petitioner during the interviews. While he revealed that his fantasies were several female partners and anal intercourse, Dr. Schuster felt that these fantasies were not unusual, were of the passive type and with no sadistic, agressive urges shown. Finally, he stated that petitioner denied this particular incident. He felt that petitioner told the truth, and that it would not be in keeping with his personality structure to have performed such acts.

The record demonstrated a person with no felony record–an honest young man from a good family.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Indiana Supreme Court.

Respectfully submitted,

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APPENDIX A

OPINION AND JUDGMENT OF THE INDIANA SUPREME COURT

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IN THE

SUPREME COURT OF INDIANA

FILED
Marjorie H. O'Laughlin
APR 7, 1981
Clerk of the
Indiana Supreme an
Court of Appeal

DAVID GEORGE KIMMEL,
Appellant,

v.

STATE OF INDIANA
Appellee.

NO. 879 S 213

APPEAL FROM MONROE SUPERIOR COURT I
The Honorable James M. Dixon, Judge

PIVARNIK, J.

After a trial by jury the appellant was sentenced on February 20, 1979, to imprisonment for an indeterminate period of not less than ten (10) nor more than twenty (20) years for burglary, and to imprisonment for fifteen (15) years for the offense of sodomy while armed with a dangerous weapon. He appeals.

Appellant raises five issues for our review. These concern the admission of evidence, the overruling of his Motion to Permit the Production of Evidence of Jury Impropriety, the denial of his Motion for Serology Examination, the trial court's refusal to admit polygraph test results, and the sufficiency of the evidence.

On the evening of June 12, 1977, the victim and her roommate were in their residence at the Ardmore Apartments in Bloomington, Indiana. Both went upstairs to their bedrooms around 10:00 p.m. K.G. went to her bedroom, closed the door, turned out the light and went to bed. The victim D.C., went to her room, read for a while, and then turned out the light and went to sleep. She awoke around 2:00 a.m. on the morning of June 13, 1977, with someone's hand over her mouth and nose. She struggled briefly. She was told repeatedly not to scream. She said that she would not scream and the person took his hand away. He leaned over her, said he was lonely and wanted to talk, and sat down on the bed. He told her his name was John and that he had come from the train yard. He told her that if she wouldn't scream he would take the knife away from her neck. After taking the knife away, he continued to hold it while he talked. D.C. described this knife as a Bowie knife about ten inches long. The man smoked a cigarette and extinguished it in the waste basket. He began touching her and she asked him to stop. He put the knife against her neck and told her to be quiet. He removed her gown and asked her if she had any baby oil. She said she did not, but that she had some lotion on the dresser. He put lotion on her, made her turn over and get on her knees. He had anal intercourse with her, zipped his pants, told her not to tell anyone, and left. She heard him stand outside her room for a while, and then

heard him going down the stairs. She heard the front door open and the chain catch. She heard him take off the chain and open the door. She got up, locked the door and went to her roommate's room. She told her roommate that she had been raped. They checked the apartment and called the police. They went downstairs and noticed that the kitchen window was open.

Three police officers arrived and searched the area. A gumball and a Vantage regular cigarette butt were found on the sidewalk. Fingerprints were lifted from the inside door knob of the living room door. A Vantage regular cigarette butt was recovered from the wastebasket in D.C.'s room.

The victim gave a description of her assailant to police and she was taken to the Bloomington Hospital. Dr. Bill Adamson examined her and determined that she had scratches or cuts on her face, neck, and rectal area. It was his opinion that she had had anal intercourse.

The victim later gave a statement and helped to construct a composite picture of her attacker. In August, 1977, she viewed a photographic lineup of eight individuals and picked one out of that lineup. Two or three weeks later she viewed a live lineup with this person in it and failed to pick him out. This person was not the appellant. In January of 1978, she viewed a second live lineup in which the individuals spoke certain phrases. At that lineup she picked out the appellant. At trial she testified that this person's voice, hair and facial features were the same as her attacker's although she admitted that she was not absolutely positive about the identification.

I.

Appellant first claims that the trial court erred in admitting evidence that he had committed another crime which was unrelated to the one for which he was being tried. Christean Eznor was permitted to testify, and she related that on December 23, 1977, a man rang the doorbell of her apartment at approximately 2:00 a.m. He asked if Lisa Cunningham lived there. She responded, "No" and the man said, "Well,

she's supposed to live in Beau Trace Apartments." Those apartments were located on the other side of Bloomington. Eznor said she was sorry but she did not know Lisa Cunningham and had never heard of Beau Trace Apartments. She shut the door and locked it. She was frightened and looked in the Bloomington directory and the I.U. student directory but could find no listing for a Lisa Cunningham. She went upstairs and then returned downstairs to find the front door open as far as possible with the chain attached. She walked into the dining room and saw a man peering in her window. He ducked beneath the window. She pounded on the window and he stood up. She then called the police.

Two officers arrived approximately five minutes later. Christean was showing them the window where she had seen the man when officer Pickell saw a person meeting her description walk across Eighth Street. The officers stopped him and on frisking him found a steak knife in his pocket. This knife was approximately seven or eight inches long. This individual was the appellant, Kimmel. He told the officers that he had used the knife to clean rabbits. Kimmel was charged with Public Intoxication and Carrying a Concealed Weapon. He pleaded guilty to Public Intoxication. The charges of Carrying a Concealed Weapon were dismissed. Appellant argues that this incident was not sufficiently similar to the incident of June 13, 1977, to warrant its admission.

The general rule in Indiana concerning the admission of evidence of separate, independent crimes or acts committed by an accused is that such evidence is inadmissible. There are exceptions to this rule recognized by our courts. It is well established that evidence of other crimes may be used to prove intent, purpose, motive, identity or a common scheme or plan. *Porter v. State*, (1979) _____Ind._____, 397 N.E. 2d 269; *Willis v. State*, (1978) _____Ind._____, 374 N.E. 2d 520, 522; *Pierce v. State*, (1977) 267 Ind. 240, 248, 369 N.E. 2d 617, 621.

The incident which occurred on December 23, 1977, which was the subject of Christean Eznor's testimony occurred at 2:00 a.m. in Bloomington. David Kimmel was arrested after

he had gone to an apartment and asked for a woman who did not live there. Ms. Eznor had gone upstairs and returned to find the front door open as far as the chain would permit and noticed someone ducking beneath her window. When apprehended, Kimmel was found to have a seven or eight inch knife in his pocket and was intoxicated. He was smoking Vantage cigarettes.

The incident which is the basis for this appeal also occurred in Bloomington at 2:00 a.m. The victim also lived in an apartment. The window was broken in, and Kimmel's fingerprint was found on the living room door. This incident involved burglary, and sodomy while armed with a dangerous weapon, a knife, by an individual who had been drinking. Vantage cigarettes were found outside, and the attacker had extinguished one in the wastebasket.

The State argues that this case is so similar to that of *Porter v. State*, (1979) _____Ind._____, 397 N.E.2d 269, that the evidence of the other crime should be admitted. The argument is also made that here, as in *Porter*, the only discrepancies are due to the fact that the defendant's efforts were effectively thwarted by the victim. In *Porter*, the victim was awakened when she heard someone in her apartment. She observed a black man in her room brandishing a knife and ordering her not to move. He removed his trousers, removed the victim's panties, penetrated her and then cut her with the knife several times and threw a plant stand at her. She ran to a window, opened it and screamed for help, whereupon her attacker left. The other incident in *Porter*, testified to by a State's witness which was allowed into evidence was that of another victim, who knew the defendant personally and lived near the defendant's residence. This victim testified that she was awakened by someone standing in her bedroom doorway. She jumped out of bed and asked who was there. The defendant grabbed her and told her to be quiet or she would get hurt. She screamed and fought her assailant. He finally left, escaping the same way he had entered, by putting a ladder to the window of her brother's bedroom,

next to hers, and breaking a window.

In *Porter, supra,* it was apparent that no sex was involved because of the interruption and that no knife was used. Both victims were attacked in their upstairs bedrooms during the early morning hours. Both were threatened to be quiet and to cooperate or they would be harmed. The second attack occurred near the first, both geographically and in time. These facts were considered to be sufficiently similar to support an inference that the appellant was the perpetrator of both attacks and this Court found the testimony of sufficient probative value to make it competent evidence.

Here, it is also apparent that Kimmel was interrupted by Christean Eznor's calling the police. These incidents both occurred around 2:00 a.m., in the city of Bloomington. Both women lived in apartment complexes. In the first incident, entry was made through a window, and Kimmel's fingerprint was found on the inside door knob. In the second incident, the door was opened as far as possible until stopped by the chain and Kimmel was observed under the window. Vantage cigarette butts were left at the scene of the first incident and Appellant Kimmel was smoking Vantage cigarettes when he was arrested in the second incident. The perpetrator of the first attack threatened his victim with a knife and Kimmel was carrying a knife when he was arrested. In both incidents, the man involved had been drinking. These facts are sufficiently similar to support an inference that the appellant was the perpetrator of both attacks, and we find this testimony to be of sufficient probative value to make it competent evidence.

II.

The appellant also claims that the trial court erred in denying defendant's motion to permit defendant to produce evidence of jury impropriety.

During the trial of this cause, on January 24, 1979, an article appeared in a local newspaper, the Indiana Daily Student, stating that the victim testified that she had previously identified the defendant in a line-up. The next day a correction ap-

peared in the paper, stating that Police Sgt. Barbara Webb had said that the victim had identified the defendant in the line-up.

The jury returned its verdict on January 26, 1979. On February 8, 1979, defendant filed a "Verified Motion to Permit Defendant to Produce Evidence of Jury Improprieties." This motion was denied on February 13, 1979, in his motion to correct errors the defendant filed additional affidavits in support of his Motion.

Affidavits by Kimmel's sister, brother, girlfriend, and another individual asserted that they had seen copies of the newspaper in the jury room. Kimmel's attorney, James Lowenthal, filed an affidavit that Hugh Martin of the *Indiana Daily Student* contacted Lowenthal and stated that he had spoken with three jurors who admitted that the *Indiana Daily Student* and other newspapers were in the jury room on a daily basis during the trial of this cause. Each of the jurors had denied that they had read any articles in any newspaper.

The judge denied the motion and stated his reasons for doing so. The reasons, in brief, were that no impropriety by any juror was alleged, only the possibility of a view of a headline; that there was no allegation that such a headline was prejudicial to the defendant; that the allegations were based on a volunteered hearsay statement; that there was no allegation that the printed information was falsified or contained any facts not presented to the jury at trial; that the jurors contacted denied having read any article and stated that any paper in the jury room was covered; and that it was the law that a jury's verdict could not be impeached by testimony of jurors. The court denied defendant's request for a hearing.

Appellant relies heavily on *Lindsey v. State*, (1973) 260 Ind. 351, 295 N.E.2d 819 in his argument that the trial court's failure to interrogate the jurors regarding the alleged impropriety was reversible error. In *Lindsey, supra*, this court held that the trial court's failure to interrogate the jury regarding alleged improprieties was reversible, but it was made clear that the risk of prejudice must be substantial. In *Lindsey*, the publicity complained of contained erroneous and inad-

missible information. In *Bruce v. State*, (1978) _____Ind. _____, 375 N.E.2d 1042 the *Lindsey* procedure was analyzed further and two types of prejudicial reports were discussed; (1) inflammatory matter which would not be admissible at trial and (2) misstatements or distortions of the evidence given at trial.

Here, the newspaper article involved simply stated on one day that the victim testified that she had previously identified the defendant. The next day, a correction appeared stating that Police Sgt. Barbara Webb had said that the victim had identified the defendant in a line-up. This newspaper statement was correct except for the reporter's error as to who had made the statement. In *Lindsey, supra*, and in *Bruce, supra*, this Court emphasized that if the risk of prejudice appears substantial, the court should interrogate the jurors as follows:

> "Upon a suggestion of improper and prejudicial publicity, the trial court should make a determination as to the likelihood of resulting prejudice both upon the basis of the content of the publication and the likelihood of its having come to the attention of any juror. If the risk of prejudice appears substantial, as opposed to imaginary or remote only, the court should interrogate the jury collectively to determine who, if any, has been exposed."

Bruce v. State, (1978) _____Ind._____ at _____, 375 N.E. 2d at 1063.

The situation in the present case is further distinguished from the situation in *Lindsey* because this alleged prejudicial publicity was not brought to the judge's attention until after the verdict. In *Hardiman v. State*, (1978) _____Ind.App. _____, 377 N.E.2d 1384, the First District of the Court of Appeals considered this precise issue and held that the precautionary procedures set forth in *Sacks v. State*, (1977)

_____Ind.App._____, 360 N.E.2d 21 [which were the *Lindsey, supra,* procedures] do not apply when alleged jury misconduct was not brought to the court's attention until after the verdict had been rendered.

The trial court here considered the alleged jury impropriety as presented in defendant's motion filed on February 8, 1979, and in defendant's motion to correct errors. The court considered the matter on the basis of its content and the likelihood of its having come to the attention of any juror. It is clear that the trial judge determined that there was no substantial risk of prejudice because of the newspapers or articles. There is no error on this issue.

III

Appellant next claims that the trial court erred in denying his motion for serological examination. Appellant Kimmel had filed a Petition for Serological Examination of Semen on February 5, 1979, which was granted on February 6, 1979. He filed another Motion for Serological Examination on April 18, 1979, which was directed to obtaining the blood type and secretor status of the victim. This motion was denied on the same day. The jury had returned their verdict on January 26, 1979, and Appellant was sentenced on February 20, 1979. Appellant argues that the denial of the motion filed April 18, 1979, constitutes error under Ind. R. Tr. P. 59(A)(5), uncorrected error of law occurring and properly raised subsequent to trial and under Ind. R. Tr. P. 59 (A)(6), newly discovered evidence. He claims that it was from the last witness on Thursday, January 25, 1979, the day before the verdict, that he learned that a valid test was available from which blood type or group could be determined from semen samples taken from the victim. Kenneth Houck, a laboratory technician testified that such tests could be conducted if semen samples had been taken and retained. At trial, Dr. Anderson, the gynecologist who had examined the victim, reiterated his opinion that such test were unavailable. Appellant claims that the possibility exists that if these tests were made, it is possible that the

results would be favorable to him. He also is basing his claim on the fact tht he learned about the possibility of making such a test only when Kenneth Houck testified on the day before the verdict was rendered. Kenneth Houck was a defense witness, and it appears that with reasonable diligence the defense could have discovered that such a test was possible before trial.

Trial Rule 59 (A)(6) provides for relief in the event of "newly discovered material evidence which could not, with reasonable diligence have been discovered and produced at the trial." "Motions predicated upon newly discovered evidence are viewed with disfavor. The grant or refusal thereof is a matter within the discretion of the trial court, and upon review, we will reverse the trial court's denial of such motion only if it could not reasonably have reached a conclusion that, upon re-trial, a different result would not be probable. *Williams v. State*, (1973) 261 Ind. 385, 304 N.E.2d 311; *Beyer et al. v. State, supra.*" *Helton v. State*, (1980) _____Ind._____, 402 N.E.2d 1263, 1267.

Defendant's proper remedy, if he were surprised at trial by the testimony of Kenneth Houck, would have been to seek a continuance. *Washington v. State*, (1980) _____Ind. _____, 402 N.E.2d 1248; *Minton v. State*, (1978) _____Ind. _____, 378 N.E.2d 639. By failing to move for a continuance, appellant has waived any alleged error. *Siblisk v. State*, (1975) 263 Ind. 651, 336 N.E.2d 650. There is no error on this issue.

IV.

Appellant seeks to have this court reconsider and reverse its position on the use of polygraph examinations. He admits that the trial court abused no discretion in refusing to admit polygraph results or to allow reference to them. His argument is designed to plead for a change in law. His argument is based on his contention that the polygraph is a valid and reliable instrument when in the control of a competent operator. He additionally claims that the results of such an examination, in the opinion of the operator, proved Kimmel was not guilty of the offenses charged.

It is well settled in Indiana that the results of a polygraph examination of a witness or a party are inadmissible in a criminal prosecution absent a waiver or stipulation by the parties. *Pavone v. State*, (1980) _____ Ind. _____, 402 N.E.2d 976; *Tope v. State*, (1977) 266 Ind. 239, 362 N.E. 2d 137, cert. denied 439 U.S. 869, 98 S.Ct. 209, 54 L.Ed.2d 146. This Court has specifically stated its concerns that the test is not sufficiently accurate to mandate its admission. *Vacendak v. State*, (1976) 264 Ind. 101, 340 N.E.2d 352, *cert. denied* 429 U.S. 857, 97 S.Ct. 141, 50 L.Ed2d 125. This Court has also expressed its fear that the jury will give undue weight to a polygraph test's validity. *Williams v. State*, (1978) _____ Ind._____, 375 N.E.2d 226 at 227. We reaffirm our holdings that polygraph examinations and results are inadmissible in a criminal prosecution absent a waiver or stipulation by the parties.

V.

Appellant finally claims that the evidence against him was insufficient to sustain his conviction. He does not argue that the State failed to prove any element of the crimes. Rather, he claims that there was insufficient evidence to identify him as the perpetrator.

When the issue of sufficiency of the evidence is raised on appeal, this Court will neither weigh the evidence nor determine the credibility of witnesses. Rather, we will consider only the evidence which is most favorable to the State, together with all reasonable inferences to be drawn therefrom, and if, from that evidence a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt, the conviction should be affirmed. *Willard v. State*, (1980) _____Ind._____, 400 N.E.2d 151.

The evidence as previously set out in this opinion revealed that a fingerprint identified as that of the appellant Kimmel was found on the inside door knob of the living room door. The victim picked Kimmel out of a live lineup in which each individual spoke certain phrases, testifying that his voice was "the

same voice I heard that night." She also stated that his hair color and facial features were as she had described. Both the perpetrator of this crime and Kimmel smoked Vantage cigarettes.

Appellant contends that it is necessary to establish that the fingerprint could have been impressed only at the time the crime was committed and that this was not done. His argument is that he explained that he attended a party a month prior to the incident in this apartment and that that was when his fingerprint was made on the door knob. He contends that this explanation should have been believed.

A fingerprint expert testified that if someone had touched the print it would have been erased or smudged, or a double impression would have been left. The victim and her roommate testified that during their residence in the apartment a cable T.V. man had used the door and that they used the door. A witness who was a resident of the apartment at the time Kimmel alleged he attended a party there did not recall seeing him at the party. The jury was not required to believe the appellant's explanation of his fingerprint on the door knob.

In *Paschall v State*, (1972) 152 Ind.App. 408, 283 N.E.2d 801, the Court of Appeals held that the presence of a fingerprint of the defendant found on the inside door knob of a burglarized house was sufficient to establish the defendant's identity as the burglar. The Court of Appeals quoted the following language from *Shuemak v. State*, (1970) 254 Ind. 117, 258 N.E.2d 159:

> "Under the circumstances it is Universally recognized a finger, palm or bare footprint found in the place where a crime was commited may be sufficient proof of identity."

152 Ind.App. at 412, 283 N.E.2d at 804.
Here the evidence was sufficient.
Judgment affirmed.
Givan, C.J., Hunter, and DeBruler, JJ., concur.
Prentice, J., dissents without opinion.

APPENDIX B

Order of the Indiana Supreme Court
Denying a Rehearing

IN THE

SUPREME COURT OF INDIANA

DAVID GEORGE KIMMEL	)	
Appellant,	)	
	)	
vs.	)	NO. 879 S 213
	)	
STATE OF INDIANA,	)	
Appellee	)	

Appellant's petition for Rehearing is hereby Denied, without Opinion.

Givan, C.J. All Justices Concur.

17th June, 1981.

Opposition

Office - Supreme Court,
FILED
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ALEXANDER L. STEV
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No. 81-319

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAVID GEORGE KIMMEL,
Petitioner,

vs.

STATE OF INDIANA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Respondent State of Indiana believes that the instant case presents no substantial federal question.

At issue here are:

1. Whether a defendant in a criminal trial is entitled to an evidentiary hearing on an allegation of possible jury impropriety which is unsupported by a showing of any substantial risk of prejudice.

2. Whether a convicted person is entitled, months after his trial, to have serological tests performed upon the victim of the rape, where he has alleged that he was not aware of the probative value of such tests until his own witness so testified at trial and where he waived any error under state procedural law by failing to request a continuance of the trial.

3. Whether the evidence, including petitioner's latent fingerprint found in the home of the rape victim, was sufficient to support the conviction.

TABLE OF CONTENTS

	PAGE
Questions Presented for Review	i
Table of Contents	iii
Table of Authorities	iv
Statement of the Case	1
Summary of the Argument	3
Reasons for Denying the Writ	3
Conclusion	5

TABLE OF AUTHORITIES

CASES	PAGE
Durley v. Mayo, 351 U.S. 277	3
Williams v. Kaiser, 323 U.S. 471	3
Woods v. Nierstheimer, 328 U.S. 211	3

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STATEMENT OF THE CASE

1. Newspapers in the Jury Room.

During trial, the Indiana Daily Student, a newspaper published at Indiana University, printed an article stating that the victim had testified that she had identified petitioner Kimmel at a lineup. Actually, a police officer had

so testified, and the newspaper printed a correction the next day.

Thirteen days after Kimmel was convicted, his defense attorney in a verified motion requested an evidentiary hearing. Counsel claimed that a reporter for the student newspaper had informed him that three jurors had told the reporter that there had been newspapers in the jury room every day of trial. The same jurors told the reporter that they had complied with the trial court's order and had not read any article pertaining to the trial. They also told him that "whenever an article was seen to apply to this case it was covered up." Defense counsel produced no affidavit executed by the Daily Student reporter or by any juror, but did accompany his motion with a memorandum of law based exclusively upon the case law of Indiana. The motion was denied.

More than two months later, petitioner Kimmel attached to his motion to correct errors affidavits executed by observers of the trial. Each affiant stated that he had seen a copy of the Indiana Daily Student within the jury room, and one affiant added that a juror had told her that she had seen a copy of that newspaper in the room more than once.

At no time did petitioner show or claim that any juror actually had seen or heard anything about the trial in any news medium.

2. Serological Test of the Victim.

A laboratory technician testified at trial that tests could be performed upon the semen recovered from the rape victim which might indicate the blood type of the rapist. The technician was a defense witness, and petitioner requested no continuance.

Ten days after the jury found him guilty, petitioner Kimmel filed a petition requesting that the court order Bloomington Hospital to attempt to determine the blood

grouping of the semen sample. The petition was granted. Then, more than two months later, Kimmel asked the trial court to order the victim to submit a statement of her blood type and her secretor status; this request was based upon a letter sent to defense counsel more than a month earlier informing him that this information was necessary. The trial court denied the request.

3. The Evidence Supporting the Verdict.

The victim selected petitioner Kimmel at a lineup after hearing him speak certain phrases, and she testified that Kimmel's was "the same voice I heard that night." She also stated that Kimmel's hair and facial features were as she had described. Kimmel, like the rapist, smokes Vantage cigarettes. Kimmel's fingerprint was found on an inside doorknob of the victim's home.

SUMMARY OF THE ARGUMENT

The Supreme Court of Indiana decided no point of federal law but rested its decision upon reasonable state procedural rules. At most, a decision of the instant case by this Court would amount to a redetermination of the facts and would consequently have no importance beyond establishing the law of the case.

REASONS FOR DENYING THE WRIT

As is clearly reflected in the opinion of the Supreme Court of Indiana in the instant case, petitioner Kimmel's appeal was decided on the basis of state procedural rules. No decision of any "federal question was necessary to its determination of the cause," and "the state ground is sufficient to sustain the judgment," *Durley v. Mayo*, 351 U.S. 277, 281; consequently, this Court would accomplish nothing by granting the petition for a writ of certiorari. *See Woods v. Nierstheimer*, 328 U.S. 211; *Williams v. Kaiser*, 323 U.S. 471.

The issue concerning the newspaper in the jury room was based upon the trial court's determination, approved by the supreme court, that there had been no showing of any substantial risk of prejudice. The material in the newspaper was not such as to cause prejudice, and in any case there was absolutely no showing or claim that any juror had read it.

The Supreme Court of Indiana decided the blood-typing issue upon the basis that defense counsel could have learned of the tests by exercising due diligence before trial: It was Kimmel's own witness who testified about the tests at trial. The court's opinion also rested upon the requirement of Indiana law that a party who is surprised by evidence newly discovered at trial must request a continuance or any error will be deemed to have been waived.

The issue involving the sufficiency of the evidence was obviously a question of fact for the jury and the trial court, subject to review by the supreme court. Even if the Court were to grant certiorari and reverse on this issue, the reversal would have no federal importance.

Kimmel's petition is no more than a request that this Court reweigh the evidence adduced below on the issues, coupled with a request that it invalidate Indiana's procedural law requiring due diligence and a request for a continuance where evidence is newly discovered. These are not federal questions of substance.

CONCLUSION

For the foregoing reasons, respondent State of Indiana respectfully requests the Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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